Central Law Journal

St. Louis, September 20, 1926

EFFICIENT FEDERAL LAW ENFORCEMENT

Every citizen and especially every lawyer should be interested in the effectual enforcement of federal laws. Few people, however, aside from the legal profession, and, of course, experienced criminals, are aware of the fact that violators of federal laws are in many cases committed for non-payment of heavy fines, serve 30 days, make application and secure their discharge, as indigent prisoners, under Section 1042, Revised Statutes. This section provides:

"When a poor convict sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison 30 days, solely for the non-payment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, . . . the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, . . . the commissioner shall administer to him the following oath: (Convict swears he is unable to pay.) And thereupon such convict shall be discharged . . ."

Having had two years' government auditing experience in one of the departments in Washington through which accounts of United States Commissioners pass for examination and audit, the writer has reached the conclusion that the above section offers a loop-hole through which federal criminals are, in a great number of cases, evading the just punishment warranted by their criminal offenses. These offenders are fined daily thousands of dollars and instead of having to work or serve out their fine at so much per day, as many of the state laws require (16 C. J., 1368, 3222 and 25 C. J., 1160, 25), they secure their release under the above section after having served only thirty days, regardless of the amount of the fine involved. Why should the violator of a federal law be shown such leniency? Under many of the state laws no such leniency is extended to criminals.

The above provision was no doubt originally based upon the Eighth Amendment, which prevents the levying of excessive fines or inflicting cruel and unusual punishments. Such a lenient provision, however, appears to be unwarranted, as imprisonment at the rate of a certain amount per day for failure to pay fine does not infringe the constitutional provision prohibiting cruel and unusual punishment (23 P. 374; 83 Cal. 388, 23 P. 372; 4 Wyo., 150, 33 P., 18. See also 16 C. J., 1359, 3201). The fine is considered the punishment, and committing defendant to custody is the means of enforcing it. (16 C. J., 1368, 3221.)

It cannot be said that the necessity for this statute is based upon the "poor debtor" provisions found in the statutes and constitutions of many of the states, as these provisions apply only to civil actions and not to criminal fines imposed by federal laws. (In re Sanborn, 52 Federal Reporter, 583. Also Revised Stat., U. S., 990.)

If a prisoner convicted of crime under the state laws can be compelled to labor on public works (Smith v. State, 14 Alabama, A. 103, 71 S. 937, and State v. Young, 138 N. C., 571, 50 S. E. 213), then there should be no valid excuse for showing violators of the same class of federal crimes any such leniency as is afforded by Section 1042, Revised Statutes. Such a section renders the effectual enforcement of federal laws an extremely difficult task, especially where the punishment involved consists of a fine alone. It puts offenses of varying degree upon an equal level, as a convict fined $5,000, for instance, serves thirty days and

goes free along with the indigent defendant who was fined only $25.00. This condition in effect nullifies any difference in degree of offense that the judge may have in mind in imposing the fine; it also places a premium on dishonesty, as the unscrupulous bootlegger, for instance, with his money concealed, has no hesitancy in swearing that he is a pauper in order to avail himself of a release under this section. Viewed from the standpoint of furthering the administration of justice, there seems to be little need for this provision. Serving out a heavy fine in thirty days is a more profitable alternative than paying it in cash. Federal offenders, convicted of violating the National Prohibition Act, enjoy a leniency under Section 1042 denied, in many states, to convicts sentenced under the state laws for the same character of offense. This situation works an injustice even against the state violators.

The federal criminal laws are enforced throughout the United States by the federal courts without regard to the widely differing laws that any of the states may have on the same class of crime. (25 C. J., 805, 119.) In view of this fact and also as there appears to be no constitutional necessity for this provision, it could be replaced with a statute providing that all unpaid federal fines should be served or worked out at the rate of a certain amount per day. In those cases where the statute violated prescribed the maximum and minimum of a fine, there would be no danger of the offender being subjected to unreasonable fines. In other cases, where the statute violated failed to fix the maximum and the minimum of a fine and left the extent of the punishment to the discretion of the court, the repealing statute could afford the convict adequate protection against unreasonable fines by providing that no poor convict sentenced by any court of the United States could be imprisoned for non-payment of a fine and cost for a longer period than, say, for instance, two years. A greater respect for federal law would be created if the criminal had to work, or, at least, serve out his fine. The replacement of Section 1042 by provisions to this effect would adequately protect the prisoner against unreasonable detention and, on the other hand, would render the enforcement of the National Prohibition Act, in particular, more effective. It would also be a decided step towards a more efficient enforcement of all federal laws and the collection of fines imposed thereunder.

WILLIAM E. REESE.

NOTE—Mr. Reese is a member of the Federal Bar, 1765 Que Street, Washington, D. C. He states the above is written as a result of two years' experience in auditing accounts in the office of the Comptroller General, where one has opportunity to observe the initial step as well as the final result of Federal prosecutions.—EDITOR.

A fisherman at Russell caught a 75-lb. kingfish. The bait he used was a 7-lb. kahawai which the kingfish swallowed. A discussion took place with the late Dr. Bamford as to whether it was right and proper that the weight of the bait inside the kingfish could be counted in as part of the kingfish. It was agreed that on grounds of equity and good conscience, and also on grounds of public policy, that the weight of his last meal should be credited to the kingfish. Dr. Bamford, who liked important matters of this kind put beyond any doubt, said: "There is clear authority for that. It is part of the Res digestae."—Butterworth's Fortnightly Notes.

The suburbanites were boasting proudly about their respective crops of parsnips, though why one should boast about a parsnip is beyond human imagining.

"Last summer," observed the optimistic-looking man, "I grew parsnips so big that I had to hire a steam derrick to get them out of the ground."

"My crop was a failure," said the pessimistic-looking man sadly. "Started off like world-beaters but sickened and died. All of a sudden, too."

"What was the matter?"

"We didn't find out for a long time. It was because the ends of the roots had been eaten off by rabbits in Australia."

"Our boss discharged three pretty stenographers today."

"Isn't it rather early in the year to be 'canning peaches'?"

NOTES OF IMPORTANT DECISIONS

A CASE UNDER THE ENGLISH AIR NAVIGATION ACT, 1920.—What is believed to be the first case arising under the Air Navigation Act, 1920, came before the courts in Roedean School Ltd. v. The Cornwall Aviation Company, Ltd., Times, 3rd inst. An interlocutory motion was made before Mr. Justice Romer praying for an injunction to restrain the defendant company from flying or permitting the flight of aircraft over or near a school belonging to the plaintiff company so as to constitute a nuisance to the plaintiffs or to the staff or pupils or servants of the school. Apart from the provisions of the Air Navigation Act, 1920, it would appear that every person who flies over another person's land is in fact technically committing a trespass, since the general maxim with regard to ownership of land is "*Cujus est solum, ejus est usque ad coelum.*" The Air Navigation Act, 1920, by s. 9 (1), provides that "No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property, at a height above the ground, which having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder and of the convention are duly complied with." This immunity is, however, counter-balanced by the absolute obligation imposed on the owner of the aircraft for any damage done thereby, it being provided in the latter part of s-s. (1) of s. 9 of the Act that "where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered." This absolute liability is, however, lessened to some extent by the proviso in that section, which gives the owner the right of recovering any damages he has had to pay from the person by whose wrongful or negligent action or omission the damage was caused, provided such person is not a person in the employment of the owner. It will thus be seen that this absolute liability of the owner of aircraft may be compared with the absolute liability of a person who allows noxious things to escape from his land and do damage to a third person. It is a moot point, however, whether the absolute liability of the former is not somewhat greater than that of the latter, since it would seem that the owner of aircraft could not plead "Act of God" as a defense, and that he might therefore be liable for damage caused through the aircraft being set on fire by lightning, for example, and doing damage to the property on which it happened to descend.—The Solicitors' Journal (Eng.), July 10, 1926.

BRAKEMAN SWITCHING EMPTY CARS ENGAGED IN INTERSTATE COMMERCE.—In Youngstown & O. R. R. Co. v. Halverstodt, 12 F. (2d) 995, decided by the Circuit Court of Appeals, Sixth Circuit, it appeared that it was a part of the duty of the crew of an interstate train, of which plaintiff was a member, to switch empty cars onto a coal mine siding. The siding was too short to take all the cars, and some were placed on another siding until the return trip, when the cars on the coal siding were brought out and replaced by the other empties. During such switching operation plaintiff was injured. Held, that such service was part of the handling of the interstate train and that plaintiff, at the time of injury, was employed in interstate commerce, within Employers' Liability Act, § 1 (Comp. St. § 8657).

We quote from the Court's Opinion:

"The Behrens Case, 233 U. S. 473, 34 S. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, is not opposed to this view. The carrier there was engaged in both kinds of commerce. But the injured employee was a member of a crew attached to a switch engine operated exclusively within the city of New Orleans, and was engaged, at the time of his injury, in moving several cars, all loaded with intrastate freight, from one point in the city to another. Railroad Co. v. Harrington, 241 U. S. 177, 36 S. Ct. 517, 60 L. Ed. 941, and Railroad Co. v. Barlow, 244 U. S. 183, 37 S. Ct. 515, 61 L. Ed. 1070, involved, like the Behrens Case, employees engaged exclusively in switching, who, when injured, were handling only intrastate freight. Those cases are clearly inapplicable to a member of a crew of an interstate train, who, in handling it, cuts out of the train some intrastate cars, and in so doing is injured. As the facts in this case respecting the contents of the train and its movements were not in dispute, it was proper for the court to declare their effect in law, and tell the jury that defendant was engaged in interstate commerce."

THE INADEQUACY OF THE FEDERAL COURTS AS A BAR TO THE REMOVAL OF SUITS FROM THE STATE TO THE FEDERAL COURT.

Introduction—It is the purpose of this paper to discuss only the prohibitions to removal due to the nature of the litigation. The question of the removal under section 33 of the Judicial Code will not be discussed.[1] As all of the cases are removed to the Federal District Courts, any limitations upon the jurisdiction of that court will be a limitation upon the right of removal.[2]

Here a word should be said concerning the part of section 28 of the Judicial Code which provides: "And no appeal or writ of error from the decision of the District Court so remanding the cause shall be allowed." This means that when the right of removal is litigated before a Federal District Court and that court decides that there is no right of removal, there can be no appeal or writ of error to the Circuit Court of Appeals or Supreme Court.[3] It has also been held that a mandamus proceeding to force a federal district judge to allow the removal of a cause will not lie before the Supreme Court.[4] If the question of removal is litigated before a lower state court and that court decides against the right of removal and the matter is then appealed in the state courts, the question of jurisdiction of the state court is not waived[5] and can be reviewed by the Supreme Court upon a writ of certiorari to the highest state court, as provided in section 237(b) of the Judicial Code.

Although there are no cases on the point, it seems clear that even if the Federal District Court remanded a case to the state court that the Supreme Court could review the question of whether or not the cause is within the exclusive jurisdiction of the federal courts and, if found to be within the exclusive jurisdiction of the federal courts, could set aside a judgment of the state court in such a case.

The Effect of the United States Constitution—The Constitution of the United States does not grant the right to have a case removed from a state court to a federal court, but as was pointed out in Tennessee v. Davis,[6]

"The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since."

This was done in the Judiciary Act of 1789[7] and has continued down to date with only minor changes and is now embodied in section 28 through 39 of the Judicial Code. It is for Congress to define and describe the methods of exercising the method of removal. Judge Aldrich in the case of In re Cilley[8] at page 978 said:

"The Constitution declares the lines within which Congress may confer jurisdiction, but the ground and limit of actual jurisdiction to be exercised by the courts are to be found in the acts of Congress, and not in the Constitution. It is not necessary to inquire as to the extreme limit of the constitutional scope of judicial power. Within its scope, whatever that may be, Congress may confer jurisdiction, and so much of the constitutional grant of judicial power as is not bestowed upon the federal courts by legislative provision remains dormant. In other words, Congress is to define and describe to what extent the judicial power is to be exercised by the federal courts."

Suits Under Special Acts—The Federal Employers' Liability Act provides that suits brought under it in a state court of competent jurisdiction should not be re-

(1) See discussion in Cent. L. Journal, Vol. 99, P. 167 (May 20, 1926).

(2) See sections 24, 265 and 266 of the Judicial Code.

(3) Cole v. Garland, 107 Fed. 759 (C. C. A., 1901); Gurnee v. County of Patrick, 137 U. S. 141; 34 L. Ed. 601 (1890); Chicago, St. P. M. & O. R. R. Co. v. Roberts 141 U. S. 690; 35 L. Ed. 905 (1891) Klein v. Wilson & Co. 7 F. (2) 777.

(4) Pacific Live Stock Co. v. Lewis, 241 U. S. 440; 60 L. Ed. 1084 (1916). Mandamus will lie to force the lower federal court to remand it to the state court re Winn, 213 U. S. 458; 53 L. Ed. 873 (1909).

(5) Re Winn 213 U. S. 458; 53 L. Ed. 873 (1909).

(6) 100 U. S. 257 at 265; 25 L. Ed. 648 at 651 (1880).

(7) 1 Stat. 73. See 18 Stat. 470 (1875) and 25 Stat. 433 (1887) as to the introducing and abolishing of the right of the plaintiff to remove a cause.

(8) 58 Fed. 977 (1893).

moved to any court of the United States.[9] This was carried over as a proviso into section 28 of the Judicial Code. This proviso has been held not only to bar the right of removal based upon the fact that a federal question is involved, but has also been extended to cases where the removal was attempted on the ground of diversity of citizenship.[10] This means that no suit under this act can be removed to a federal court.

In the Jones Act, sometimes called the Seamen's Liability Act,[11] it was provided as to suits for personal injuries, "In all such actions all statutes of the United States *modifying or extending the common law right of action,*" should apply. As to suits for death, "all such statutes *conferring or regulating* the right of action," should apply. It was first thought that the difference in words meant a difference in the treatment of actions for personal injury and death. Later, Judge Augustus Hand pointed out that this was simply because of the historical way of treatment of the two causes and said:

"To be sure the provision against removal (in the Employers' Liability Act) is not itself any modification or extension of a 'common law right or remedy,' yet it is part of a statute which does modify a common law right or remedy, and this is naturally appropriated along with the other provision of the statute.[12]

There were two early cases were the plaintiff was suing for personal injury where the court allowed removal.[13] The judge took the view that the part of the Employers' Liability Act not allowing removal was not referred to by the Jones Act. He said at page 819:

"That portion of section 8662 and section 28 denying removal does not modify the common law in cases of personal injuries. It modifies the statute law of removal. To hold that Congress intended to incorporate this provision, it is necessary to find that the statute on removal is a part of a common-law right in case of personal injury. The statute of removal of causes is no part of the common law. It cannot even be said to be either a modification or extension of a common-law right or remedy. It is merely the machinery for getting the case into the right court."

The rule has now changed and it is settled that there is no right of removal of a suit under the Jones Act either for personal injuries or wrongful death, as the provisions of the Employers' Liability Act are held applicable by virtue of the above quoted sections of the Jones Act:[14]

"And provided further, That no suit brought in any state court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000."

This was necessary or the federal courts would have been burdened with all loss and damage suits as cases arising under the laws of the United States.[14a]

Suits of a Civil Nature—Section 28 of the Judicial Code provides that, "Any suit of a civil nature," may be removed. This does not mean that all suits of a civil nature can be removed. Some exceptions will be pointed out later. Sections 31 and 33 of the Code modify this provision by allowing some

(9) U. S. Comp. Stat. 8662 (1910).

(10) Kansas City Sou. v. Leslie, 238 U. S. 599; 59 L. Ed. 1478 (1915); Sou. Ry. v. Pucket, 244 U. S. 571, 61 L. Ed. 1321 (1917); contra and overruled Van Brimmer v. Texas & P. Ry. Co. 190 Fed. 394 (1911).

(11) 41 Stat. 988 (1923).

(12) Martin v. U. S. Shipping Board 1 F. (2) 603, 604 (1924).

(13) Wenzler v. Robin Line, 277 Fed. 812 at 819 (1921); see also Malia v. Sou. Pacific Ry., 293 Fed. 902 (1924).

(14) As to personal injuries Herrera v. Pan-Amer. Line, 300 Fed. 563 (1924); Ataniza v. U. S. Shipping Board, 3 F. (2) 845 (1924), as to death, Beerig v. Clyde S. S. Co. 300 Fed. 561 (1923); Cf. Loyang v. Alaska SS. Co. 8 F. (2) 206 (1924).

(14a) A suit against the U. S. Shipping Board held to be removable as "a suit arising under the law regulating commerce." James v. U. S. S. Board 12 F. (2) 89 (1926).

specified criminal cases to be removed,[15] but as a general rule a suit which will result in a fine or imprisonment cannot be removed. It has been held that a suit by the Attorney General of a state to recover a forfeit from a railroad guilty of extortion is not removable,[16] but a suit to recover a penalty against a telegraph company for discrimination, the suit being brought by the person discriminated against is removable.[17] The distinction here is that in the first case the state received the benefit and in the second case the person injured received the benefit, although not strictly as damages. It has also been held that a suit by the Attorney General of a state to obtain an injunction against a company upon the ground that it was violating the state anti-trust law is a civil suit and is removable.[18]

Suits for Writs of Mandamus—As has been pointed out above, any limitation upon the original jurisdiction of the Federal District Court is a limitation upon the right of removal. It has always been the rule in the federal courts, contrary to most state courts, that the writ of mandamus should be used only when necessary to the exercise of the court's jurisdiction.[19] In 1881 in the case of Davenport v. The City of Dodge[20] it was held that the lower federal court has no jurisdiction over a suit to force the treasurer of a county to levy a tax and pay certain bonds in such a manner as was provided for in the bonds. The court took the view that it was proper to bring such a suit in the state court as the state court would try the question of liability upon the application for a writ of mandamus, but as the federal courts, upon an application for a writ of mandamus, could not try the question of liability the case could not properly be removed. In 1886 the Supreme Court, in the case of Rosenbaum v. Bauer,[21] Mr. Justice Blatchford writing the opinion, held that a suit for mandamus to force the Treasurer of the City of San Francisco to advertise for redemption certain bonds as provided by a state statute could not be removed to the federal court. The court took the view that a federal court could not take jurisdiction of a case to issue a writ of mandamus but could issue only such a writ in the exercise of jurisdiction obtained on other grounds. Three of the Justices—Bradley, Harlan and Matthews—dissented on the ground that at this time the suit for a writ of mandamus had really become a civil suit for the adjudication of a question of duty and the courts no longer followed the old English practice of using the writ only to carry out the jurisdiction of the court. In other words, they wanted to modernize the federal court procedure. In the case of North Carolina Pub. Service Corp. v. Sou. Power Co.[22] the State Court of North Carolina refused to allow the removal of a mandamus suit to compel an electric light company to furnish the proper service. In the same case in the Circuit Court of Appeals[23] the court allowed removal but put it on the ground that the cause was really an application for an injunction against a threatened violation of a duty. They said that a mandamus was used only to compel the performance of a plain and positive duty. The Supreme Court granted a certiorari but later dismissed it.[24] In a later case a suit for mandamus to force a street railway company to raise the grade of a street was removed.[25] The court said this was a mandamus proceeding but in the opinion said:

"The present suit is not one where mandamus is the only remedy. That which the petition describes amounts to a nuisance, and, in equity, a nuisance may be abated by injunction, and the relief prayed for does not go beyond what would ordinarily be afforded in such a suit."

(15) See note 1 ante.

(16) Iowa v. Chicago B. & Q. R. R. 37 Fed. 497 (1889).

(17) Gruether v. Cumberland Tel. & Tel. 181 Fed. 248 (1919).

(18) Ohio v. Swift, 270 Fed. 141 (1921).

(19) Hopkins' Judicial Code, sec. 262, page 289.

(20) 105 U. S. 237, 26 L. Ed. 1018 (1882). Also Barber v. Hatfield, 4 F. (2) 245 (1925).

(21) 120 U. S. 450. 30 L. Ed. 743 (1887). See dissent page 461.

(22) 180 N. C. 355; 104 S. E. 872 (1920).

(23) 282 Fed. 837 (C. C. A. 1922). To the same effect see Washington v. Pacific Tel. & Tel. Co. 1 F. (2) 327 (1924).

(24) 260 U. S. 716, dismissed 263 U. S. 508.

(25) State v. Seattle, 2 F. (2) 264 (1924).

Thus it seems that the courts are getting away from the old rule and are looking at the substance of the case and if there is ground for equitable relief they will allow removal although the action is called mandamus. This is even an improvement over what the dissenting judges in Rosenbaum v. Bauer advocated.

Suits Under State Laws "Enlarging Equitable Jurisdiction"—It has long been a rule in the federal courts that a state law can neither increase nor decrease the jurisdiction of a federal court. Mr. Justice Matthews in McConihay v. Wright said, "The test of equitable relief in these [Federal] courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by an Act of Congress."[26] From this it has been argued that the federal courts cannot entertain suits under all state laws as some of them give the state courts jurisdiction in equity which an equity court did not have in 1789.

In Holland v. Challen[27] a federal court entertained jurisdiction of a suit under a Nebraska statute which provided that a suit to quiet title to land might be brought by either a person in possession or by a person out of possession of the land. In this case neither the plaintiff nor the defendant were in possession of the land. It is to be noticed that in such a case as this, prior to the statute, the plaintiff would have had no relief, as a court of equity did not take jurisdiction of a suit to quiet title unless the plaintiff was in possession of the land. The court (Mr. Justice Field writing the opinion) argued that this statute gave a person, who had no right, a right of action and that such an action, one to quiet title, was within the historical jurisdiction of the equity courts. They maintained that this was not an increase of the jurisdiction of the federal equity court, but was the establishment of a new right which could be enforced in any court. There was a similar statute in the State of Iowa. The state courts had construed it as allowing an action by a person *out of possession of land against a person who was in possession of the land.* Such was the suit which the Supreme Court held could not be brought in a federal court.[28] The court pointed out that the question involved in this case was expressly left open in the case of Holland v. Challen. In that case there was no remedy for the plaintiff except under the statute. In this case the plaintiff could have brought an action of ejectment at law. They said that this case was primarily a suit at law and as it was not shown that the damages at law were inadequate in this case, a holding that this action could be brought in a federal court would be allowing a state statute to increase the equitable jurisdiction of the federal courts.

In the State of Indiana a statute allowed the equity court to relieve against a deed which was void on its face. In the case of Reynolds v. Crawfordsville Bank[29] a suit under this statute was allowed to be removed to the federal court. It is submitted that this case is wrong, as here the defendant was in possession of the land and the plaintiff could have had an action in ejectment against him. Historically an equity court never relieved against a deed which was void on its face. Here the remedy at law was adequate and also the plaintiff was enforcing in an equity court a right which has always been considered legal.

It has been held that a suit under a Texas statute which allowed an action, in equity, in trespass to try title could not be removed to a federal court.[30] Here the action was historically a legal action and the remedy at law was adequate. Therefore, there was no reason to have such an action in equity.

Many states have statutes which allow suits in equity to subject the property of a debtor to the payment of a simple contract

(26) 121 U. S. 201, 206. 30 L. Ed. 932 (1886).
(27) 110 U. S. 15. 28 L. Ed. 52 (1883). Similar cases, Clark v. Smith, 13 Peters 195. 10 L. Ed. 123 (1839); Bardon v. Land & River Co. 157 U. S. 327. 39 L. Ed. 719 (1894).
(28) Whitehead v. Shattuck 138 U. S. 146, 34 L. Ed. 873 (1891).
(29) 112 U. S. 405, 28 L. Ed. 733 (1884).
(30) Anderson v. Sharp, 189 Fed. 247 (1911). See also Young v. Porter, 3 Woods 342; Federal Cases 18, 171 (C. C. A. 1878).

debt. It has been held that suits under such statutes could not be removed to a federal court.[31] The court gave three reasons why this could not be done: First, they said that this would be contrary to the provision for jury trial in the Constitution because, second, there was an adequate remedy at law. The third reason was that the plaintiff had a legal right and this statute allowed him to enforce it in the equity court and therefore this was an increase of the equity jurisdiction of the court. In Massachusetts there was a statute which gave an equity court jurisdiction of a suit by creditors to reach all of the assets of a debtor which could not be reached at law. In Matthews Bros. v. Matthews[32] it was held that a case under this statute could not be removed to a federal court. It is submitted that this case is wrong under either theory. There was no adequate remedy at law whereas the assets could not be reached by a law court by the terms of the statute. This was not enforcing a legal right in an equity court as there was no legal right to reach these assets of the debtor. In the State of Delaware there is a statute which provides that an equity judge can exercise his discretion as to whether or not to appoint a receiver upon the application of an unsecured creditor. It was held in Pusey & Jones v. Hanssen[33] that a suit under this statute could not be brought in the federal court as this was increasing the jurisdiction of the court. An unsecured creditor has a right at law, but none in equity. He has no substantive right in the property of his debtor. He may not (except under such a statute as this) have a receiver appointed. Mr. Justice Brandeis said, at page 499:

"It makes possible a new remedy because it confers upon the chancellor a new power. Whether that power is visitorial (as the appellate insists), or whether it is strictly judicial, need not be determined in this case. Whatever its exact nature, the power enables the chancellor to afford a remedy which theretofore would not have been open to an unsecured simple contract creditor. But because that which the statute confers is merely a remedy, the statute cannot affect proceedings in the federal courts, sitting in equity."

This is purely a remedial action. Therefore allowing such a remedy in the federal equity courts would be allowing relief in equity to a person who had not shown that his remedy at law was inadequate. This would be allowing the state statute to give the federal court jurisdiction to give a new kind of remedy. It would be an increase of the jurisdiction of that court and therefore such a suit cannot be brought in the federal courts.

Although in these cases the court talks of the statute as increasing the jurisdiction of the equity court, the real basis of these decisions seems to be that the remedy at law was adequate whenever they refused to take jurisdiction of the case. The case of Reynolds v. Crawfordsville Bank, supra, is the only case in which the Supreme Court went off on another ground. In that case the court went on the ground that they were looking at the state law to see what was a cloud on a title and the statute said that a deed void on its face was a cloud on the title. As said above, this case seems wrong under any theory.

Probate Jurisdiction—At no time has Congress provided by statute any means for the probate of a will in the federal courts. This probably explains why the federal courts are so reluctant to take jurisdiction of a suit which involves the probation of a will. In DuVivier v. Hopkins[34] the Supreme Judicial Court of Massachusetts held that a suit in the probate court to establish a claim against an estate could not be removed to the federal court. Mr. Chief Justice Gray gave four reasons why this was so: 1. The state court had jurisdiction over the entire settlement of the estate.

(31) Scott v. Neely, 140 U. S. 106, 35 L. Ed. 358 (1890); Cates v. Allen, 149 U. S. 451, 37 L. Ed. 804 (1892); Atlanta & Florida R. R. v. Western Ry. of Ala. 50 Fed. 790 (C. C. A. 1892); Harrison v. Farmers' Loan & Trust Co. 94 Fed. 728 (C. C. A. 1899). See also Hollins v. Brierfield, 150 U. S. 371, 379, 37 L. Ed. 1113, 1115 (1893), and Miss. Mills v. Cohn, 150 U. S. 202, 205. 37 L. Ed. 1052, 1053 (1893).

(32) 148 Fed. 490 (1906). Cases collected at page 493.

(33) 261 U. S. 491, 67 L. Ed. 763 (1923) Justices McKenna and Sutherland dissented.

(34) 116 Mass. 125 (1874).

2. That this suit was ancillary to the probate proceedings and therefore could not be removed. 3. That this was not a case (a suit between parties) and therefore did not come within the jurisdiction of the lower federal court as set out in the statute (Section 24 of Judicial Code). 4. That there could be no removal after an appeal.

In 1875 the Supreme Court decided the case of Gaines v. Fuentes[35] in which it was held that a suit under a Louisiana statute could be removed. This statute provided that after the probate of a will in common form, if the will was set up as a muniment of title, it could be contested. There was a dissent in this case by Mr. Justice Bradley and Mr. Justice Swayne on the ground that this was a peculiar method used in Louisiana for the attacking of a will and was part of the probate proceeding and should not be removed. In Broadhead v. Shoemaker[36] it was held that an appeal to the county court from an order probating the will in the solemn form could be removed. Here the state statute provided for a de novo proceeding in the county court, so there is not the objection of this being the removal of a case on appeal. This case seems wrong as in reality this is a part of the probate proceedings. It has been criticized.[37]

A Texas statute allowed a suit inter partes to contest the validity of a will. This was brought in the probate court with an appeal to the county court. After an appeal a suit under this statute was not allowed to be removed.[38] The court did not base the decision on the ground that this was an appeal but said that this was really a part of the probate proceeding, and so should not be removed. The principle of this case is contrary to the principle in the Broadhead case.

It has been held that suits against the administrator to establish claims against the estate can be removed.[39] These are said not to be part of the probate proceeding. The question of whether these are ancillary to the probate proceeding was not fully discussed but it does not appear that these suits should necessarily be tried in the same court as the probate proceedings are tried; therefore, there is no objection to removal.

The general idea running through these cases is that the federal court if possible desires to avoid becoming involved in litigation which looks to proving a will. This is properly left with local courts.

Ancillary Proceedings—It is clear that the courts should not allow removal of part of a proceeding which is pending before a state court. This would not be the most expedient or least expensive method of carrying out the litigation. The case of Bank v. Turnbull[40] was a suit under a statute which allowed the claimant of property levied on as the property of another to file a suspending bond and try his title to the property. This action was held to be ancillary to the attachment proceeding and not removable. A suit for an injunction to stop A, who had a judgment against B, from levying on the plaintiff's property was held to be removable.[41] Mr. Justice Woods, at page 287, said:

"The case of Bank v. Turnbull and Co., relied on by the appellee, is not in point. That was a statutory proceeding to try in a summary way the title to personal property seized on execution. It was nothing more than a method prescribed by the law to enable the court to direct and control its own process."

He said that this case was a separate proceeding from the suit by A against B, distinguishing it from the prior case.

In a Georgia case[42] there was a bill in equity to marshall assets. The chancellor allowed suits at law to establish claims against the administrator. No execution could be had except upon a final order of the chancellor. Held, a suit at law under the order of the chancellor was ancillary to

(35) 92 U. S. 10, 23, L. Ed. 524 (1875). See also Ellis v. Davis, 109 U. S. 485, 27 L. Ed. 1006 (1883).
(36) 44 Fed. 518 (C. C. A. 1890).
(37) Wahl v. Franz, 100 Fed. 680 (1900). Also Thompson v. Nicholes, 254 Fed. 973 (1919).
(38) Sutton v. English, 246 U. S. 199; 38 Sup. Ct. Rep. 254, 62 L. Ed. 664 (1917).
(39) Hess v. Reynolds, 113 U. S. 73, 28 L. Ed. 929 (1884). Clark v. Bever, 139 U. S. 96, 35 L. Ed. 88 (1890).
(40) 16 Wallace 190, 21 L. Ed. 296 (1873).
(41) Bondurant v. Watson, 103 U. S. 281; 26 L. Ed. 447 (1881).
(42) Burts v. Loyd. 45 Ga. 104. (1872).

the bill in equity and could not be removed separately.

A proceeding to have a receiver appointed for a person whom the plaintiff had a judgment against was held ancillary to the suit in which the judgment was obtained, and could not be removed.[43] But a suit by a receiver appointed by a state court to get control of the assets of the estate can be removed.[44]

The principle behind these cases seems to be that the suit should be tried in the most convenient and least expensive place. Usually if there is a related question being tried, the place where the previous question is being tried is the proper place.

Condemnation and Assessment Proceedings—A statute of the State of Minnesota required that prior to condemning land the applicant should apply to the district court to appoint a commission to value the land. It allowed an appeal from their valuation to the district court where the proceeding would be heard "in the same manner that other cases are heard in the same court." After an appeal was taken under this statute the defendant was allowed removal.[45] The court said that there should be no removal under that statute before the appeal as then it was not a case within the meaning of the removal statute. Following this dicta a proceeding before the Mayor and a jury to value the land taken was not allowed to be removed.[46] Also a proceeding before a commission appointed by the judge of the district court was not allowed to be removed.[47] The same result was reached in a case before the county court in West Virginia.[48] In that case it was pointed out that the county court in that state had no judicial powers except in probate proceedings, therefore these proceedings before that court could not be a case. The above case was followed in a lower federal court in a case where the Illinois county court seemed to have judicial power which the West Virginia county court did not have.[49] This case was criticized and the West Virginia case distinguished in the case of Road District v. St. Louis & S. W. Ry.[50] by Chief Justice Taft. These cases show that the courts have worked out a different way of treating condemnation proceedings which involve only one party on each side and proceedings for condemnation or assessment which involve the whole neighborhood. In the latter case they do not allow removal because it is to the best interest of all parties that the property of all concerned be dealt with together. This is analogous to the situation discussed under the subhead "Ancillary Proceedings." They might put these cases on the ground that the causes are inseparable. The other ground of distinction, in these cases, is that in some of them there is a real judicial proceeding while in others there is mere administrative inquiry as to value which is to be followed by a judicial proceeding.

In the case of the Traction Co. v. The Mining Co.[51] the Supreme Court allowed removal of a proceeding in which the defendant was given notice to show cause why the report of the assessment commission should not be accepted. In Searl v. The School District[52] the statute provided for a proceeding before a special jury of six in the district court. The case was to be tried as any other case before that court. This was held to be a judicial proceeding and therefore held to be removable to the federal court. Wherever after the assessment values are set and the defendants are given a chance to come before a court and be heard the courts allow removal, as then there is a controversy inter partes.[53] The

(43) Mutual Reserve Fund Ass. v. Phelps, 190 U. S. 147; 47 L. Ed. 987 (1902).
(44) Porter v. Davis, 223 Fed. 465 (C. C. A. 1915).
(45) Boom Co. v. Paterson, 98 U. S. 403; 25 L. Ed. 206 (1878).
(46) Pacific R. R. Removal Cases, 115 U. S. 1, 17; 29 L. Ed. 319, 324 (1884).
(47) Kaw Valley Dist. v. Mining Co., 186 Fed. 315 (C. C. A. 1911), certiorari denied 220 U. S. 615.
(48) Upshur County v. Rich, 135 U. S. 467; 34 L. Ed. 196 (1890).
(49) In re City of Chicago, 64 Fed. 897 (1894).
(50) 257 U. S. 547; 66 L. Ed. 364 (1921).
(51) 196 U. S. 239; 49 L. Ed. 462 (1905).
(52) 124 U. S. 197; 31 L. Ed. 415 (1887).
(53) The Road District v. St. Louis S. W. Ry. note 50 supra Chicago M. & St. P. Ry. v. Spencer, 283 Fed. 824, (1922), Ala. Power Co. v. Gregory Hills Co. 5 F. (2) 705 (1925).

objection that this is the removal of a case on appeal cannot here be urged, as the first hearing before the valuation commission is not a case and the appeal to the court is litigated as a de novo proceeding. It is presumed that the principle of the cases on assessment and condemnation proceedings would govern the removal of cases under the State Workmen's Compensation Acts. There the first hearing to determine the damages is usually brought before an administrative board. An appeal from such a hearing becomes a case within the meaning of section 24 of the Judicial Code and is therefore within the jurisdiction of the Federal District Courts.

Suits to Enforce Arbitration—The State of New York has a statute which legalizes contracts to submit questions on certain kinds of contracts to arbitrators before carrying the matter to suit. A suit to force a person to carry out an agreement to arbitrate under this statute was not allowed to be removed.[54] The court's decision was on two grounds: 1. That as the right to specific performance was conjectural, therefore the necessary jurisdictional amount ($3,000) could not be said to be present. 2. That this was not a case under the removal statute. Here he cited Rosenbaum v. Bauer (Note 21, supra). In a later case on the same subject the judge said:[55]

"The acts of the arbitrators may well be likened to those of the commissioners in condemnation proceedings or of commissioners in determining the benefit of assessment for public improvement."

This may all be so but that is not convincing to the effect that this is not a suit within the meaning of the removal statute. It appears to be a suit to determine the rights of the plaintiff to take this matter to an arbitrator. Of course we still have the objection that the necessary jurisdictional amount is not in controversy.

Divorce and Lunacy Proceedings—Mr. Justice Wayne, in the case of Barber v. Barber,[56] said:

(54) In re Red Cross Line, 277 Fed. 853 (1921).
(55) Marchant v. Mead-Robinson Co. 7 F. (2) 511 (1925). Judge Trieber.
(56) 21 Howard 582; 16 L. Ed. 226 (1858).

"The national power has no jurisdiction in the courts of the United States upon the subject of divorce or the allowance of alimony either as an original proceeding in chancery or as an incident to divorce a vinculo or to one from bed and board."

It has been held that the jurisdictional amount is not present in a divorce suit even if they claim more than $3,000 as alimony because whether they get it or not is very conjectural.[57] It appears that the real reason is that the federal courts do not want to clog their docket with proceedings of purely local significance.

It has been held that the jurisdictional amount is not present in a suit to establish the lunacy of a person.[58] It was also mentioned in this case that this was really an administrative function and therefore it was not a case within the meaning of the removal section.

Conclusion—The right of removal was originated because of the idea that a person from another state could not obtain a fair trial in a court of the state in which his opponent lives. This is clearly brought out by the fact that directly after the Civil War, the right of removal was greatly increased.[59] The present-day tendency is to cut down the right of removal along with the jurisdiction of the federal courts in matters of no great importance.[60] As can be seen by the recent cases the federal courts are doing all in their power to find ways to deny the right of removal so as to lessen their work, and the original idea of prejudice against foreigners and citizens of other states is being forgotten, except in criminal cases against revenue officers.

EDGAR WATKINS, JR.

Atlanta, Ga.

(57) Bowman v. Bowman, 30 Fed. 849 (1887); Chappell v. Chappell, 86 Md. 532 (1899).
(58) United States v. Haviland, 297 Fed. 431 (C. C. A. 1924).
(59) See note 7 supra.
(60) See note 14 supra and proviso to section 28 of the Judicial Code.

NOTE.—We are pleased to introduce to our readers the son of one who has been a contributor to the Central Law Journal for some years. Those interested in this subject will find another article, entitled "Removal of Causes Under Section 33 Judicial Code," by Mr. Edgar Watkins, in 99 Cent. L. J. 167.—EDITOR.

INSURANCE—AUTOMOBILE LIABILITY

STACEY v. FIDELITY & CASUALTY CO.

152 N. E. 794

(Court of Appeals of Ohio, Huron County. Sept. 29, 1925. Affirmed by Supreme Court April 27, 1926.)

One injured by automobile cannot recover amount of judgment awarded him in action against owner, from owner's insurer, where insured failed to notify insurer of accident as required by policy; Gen. Code, §§ 9510—3 and 9510—4, authorizing judgment creditor to apply "insurance money" of defendant to judgment, meaning such money as was recoverable on policy by insured against insurer.

Young & Young, of Norwalk, for plaintiff in error.

Howell, Roberts & Duncan, of Cleveland, for defendants in error.

RICHARDS, J. This is an action against an indemnity insurance company and the owner of an automobile, who was insured in the company, to recover the amount of a judgment awarded the plaintiff, Charles L. Stacey, in a personal injury case.

The plaintiff, in his amended petition, averred that he received personal injuries on July 5, 1920, by the negligence of the defendant James F. Troyan, and that in an action based thereon he recovered a judgment for $500, which is still in full force and effect. He averred further that said defendant was insured in the Fidelity & Casualty Company of New York, a copy of the policy being attached to the pleading. The Fidelity & Casualty Company filed an answer, in the second defense of which it alleged, in substance, that the policy of insurance provided that upon the occurrence of an accident the insured should give immediate written notice thereof, with the fullest information obtainable at the time, to the company at its home office, or to the agent who had countersigned the policy, and that, if any suit should be brought against the insured, notice of such claim of assured should be immediately forwarded to the company, together with every summons or other process, as soon as served on him, and that the company reserved the right to settle any claim or suit. The answer further averred that the assured, James F. Troyan, wholly failed and neglected to give this defendant any notice that any claim had been made on account of such accident, and failed and neglected to notify this defendant that any suit had been brought against the insured to enforce such claim, and failed and neglected to forward to the company's home office, or elsewhere, any summons or other process, or any papers whatever, in connection with such suit, and that the company had no information or knowledge of any claim that any such lawsuit had been brought until long after the rendition of the judgment.

A demurrer was filed to this defense on the ground that it did not state facts sufficient to constitute a defense to the amended petition, and the demurrer was, on consideration, overruled. The plaintiff not desiring to plead further, a final judgment was rendered dismissing the petition and assessing costs against plaintiff.

The conditions of the policy require that the assured shall give to the insurance company immediate written notice of the accident, with the fullest information obtainable, and these provisions are clearly of the essence of the policy, and unless they have been complied with, no action would lie on the policy, by its very terms. The liability assumed by the insurance company is assumed under the terms and provisions of the policy, and not otherwise. It is true that the policy must be construed in connection with the sections of the statute (sections 9510—3 and 9510—4, General Code), and counsel for plaintiff insist that by the provisions of the former section the liability of the insurance company became absolute. That section, however, cannot be construed to debar the insurance company from setting up any defense which it may have and from seeking the judgment of the court thereon. Under that section the liability of the insurance company became absolute as to the issues adjudged in the action brought to recover damages resulting from the negligence of Troyan. The defenses set up in the answer of the insurance company were not adjudicated, and could not have been adjudicated in the former action. To construe the statute so as to inhibit the insurance company from making those defenses would result in depriving the company of its day in court.

It will be noticed that section 9510—4, General Code, in providing a remedy for a judgment creditor, enacts that he may proceed "against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment." The "insurance money" can only mean such money as was recoverable on the policy by the insured against the company issuing the policy.

In view of the fact that this court carefully considered the rights of parties under a policy of this character in the case of United States Casualty Co. v. Breese, 152 N. E. ——, decided

in Lucas county on January 19, 1925, we deem it unnecessary to further discuss the principles involved, but content ourselves with citing the authorities contained in that opinion. These authorities are Travelers' Ins. Co. v. Myers & Co., 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760; Employers' Liability Assurance Corp. v. Roehm, 99 Ohio St. 343, 124 N. E. 223, 7 A. L. R. 182; Jefferson Realty Co. v. Employers' Liability Assurance Corp., 149 Ky. 741, 747, 149 S. W. 1011; Phoenix Cotton Oil Co. v. Royal Indemnity Co., 140 Tenn. 438, 205 S. W. 128; Lorando v. Gethro, 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374; Cogliano v. Ferguson, 245 Mass. 364, 139 N. E. 527.

In all essential particulars, the case at bar is on all fours with the case formerly decided by this court. If any distinction is to be drawn between the two cases, the one at bar is a stronger case in favor of the insurance company, for in the case now under consideration no notice whatever was given to the insurance company at any time before judgment.

For the reasons given, the judgment will be affirmed.

Judgment affirmed.

WILLIAMS and YOUNG, JJ., concur.

NOTE.—*Failure of Insured to Give Notice to Insurer as Affecting the Rights of Person Injured by Insured Automobile.*—The general rule stated in the reported case has been held subject to exception in the case of a policy given to the operator of an automobile carrying passengers for hire in compliance with a statute or ordinance requiring the same. Thus where an insurance policy filed with a municipality by a jitney operator to indemnify third persons injured by the operation of such jitney, provided for the payment of the indemnity to an injured third person, the omission of the insured to comply with the requirement in case of accident to give the insurer notice of such accident was held not to affect the right of an injured third person to recover under the policy. Gillard v. Manufacturers Insurance Company, 93 N. J. L. 215, 220, 107 Atl. 446.

There was a similar holding in an action on a policy which provided that it should inure to the benefit of persons damaged "regardless of any of the conditions of this policy." Arizona Mutual Automobile Insurance Co. v. Bernal, 23 Ariz. 276, 203 Pac. 338.

BOOK REVIEWS

COLLIER ON BANKRUPTCY — PAMPHLET EDITION

A pamphlet of 181 pages bound in paper, entitled as above, has been received from the publishers, Mathew Bender & Company, Albany, New York. This pamphlet is intended to meet the immediate demand for the Bankruptcy Act with the new amendments. There are thirty important amendments to the Bankruptcy Act which became effective August 27, 1926.

Each section of the Bankruptcy Act is annotated and has cross references to other sections of the Act, to the General Orders and to the official and unofficial forms. It contains copious notes referring to the discussion of the subjects covered by the Statute, together with official forms in bankruptcy, as prescribed by the Supreme Court of the United States, with annotations, and General Orders in Bankruptcy, as amended to January 1, 1926, fully annotated. There were seven important additional General Orders adopted by the Supreme Court in 1925. The cross references inserted after each General Order are to Sections of the Act, to the Official and Supplementary Forms and to the Equity Rules. Cases construing and applying the several orders are digested and classified. These Orders explain, amplify and apply the provisions of the Bankruptcy Act and have the full force of law except as they conflict with the Act.

REPORT OF THE CRIMES SURVEY COMMITTEE

We are in receipt of a copy, just published, of the report of the Crimes Survey Committee of the Law Association of Philadelphia. This Committee was appointed pursuant to the request of the judges of the courts of common pleas of ..... County, "to make a survey of all matters connected with the administration of criminal justice in Philadelphia, to report the results of their inquiry, together with their recommendations as to the measures that should be adopted in order to better the existing situation, if it be found in any respect to need improvement."

The scope of the investigation, together with the Committee's conclusions and recommendations, are indicated by the following headings of the eight divisions of the report:

Part I. Preliminary Considerations.

Part II. The Agencies of Criminal Administration.

Part III. The Pursuit of the Offender.

Part IV. Adjudication of the Offense.

Part V. Securing the Presence of the Accused and the Witnesses for the Prosecution.

Part VI. Effect of Conviction and of Discharge or Acquittal upon the Rights and Liabilities of the Accused.

Part VII. Criminal Administration in its Numerical Aspect.

Part VIII. The Criteria of Successful Administration Applied.

DIGEST

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Quarantine Right.—The possession of a widow under her quarantine right is not adverse and confers no greater or superior title to her grantee.—St Clair Springs Hotel Co. v. Balcomb, Ala., 108 So. 858.

2. **Attorney and Client**—Attorney's Fee.—Contract that attorney's compensation in personal injury action equal amount received by client if client settle without attorney's consent held not within condemnation of contracts seeking absolutely to prevent settlements without attorney's consent when result is reasonable because intended to safeguard attorney against settlements for small sums, whereby he would be deprived of compensation.—Ward v. Orsini, N. Y., 152 N. E. 696.

3.——Notice of Unrecorded Deed.—For notice of unrecorded deed to attorney to bind client, notice must be received by attorney while engaged in a service for his client to which the notice relates.—Wiggins v. Stewart Bros., Ala., 109 So. 101.

4. **Automobiles**—Collision.—An ordinance providing that no person shall drive vehicle so as to collide with or strike any person or property is void because making driver an insurer of safety without regard to his care.—Ticknor v. Seattle-Renton Stage Line, Wash., 247 Pac. 1.

5.——Collision.—Truck driver, failing to use reasonable care required to have truck under such control as to enable him to stop within 10 feet while approaching intersecting street about such distance behind automobile, which he knew would stop if signaled, was guilty of contributory negligence.—Zandras v. Moffett, Pa., 133 Atl. 817.

6.——Duty of Salesman.—In action for death of occupant of automobile while being driven by defendant's automobile salesman, evidence that it was salesman's duty, in addition to selling cars, to demonstrate cars to prospective buyers, and that use of cars for such purposes was limited to fixed hours each day, supports inference that salesman during working hours was subject to direction and control of defendant, and sustained finding of jury that salesman was employee of defendant, and not an independent contractor.—Curran v. Earle C. Anthony, Inc., Cal., 247 Pac. 236.

7.——Railroad Crossing.—Traveler on paved highway in populous town, approaching crossing where safety gates were raised held not to have duty, after stopping, of alighting from automobile and going on foot to tracks to further observe possible approach of trains.—Sharpless v. Delaware, L. & W. R. Co., Pa., 133 Atl. 636.

8. **Bankruptcy**—Discharge.—False statement of assets furnished banking company, handling accounts of mercantile company by whom credit was advanced to bankrupt held not within Bankruptcy Act, § 14b, cl. 3 (Comp. St. § 9598), providing that bankrupt, obtaining money or property on materially false statement or writing, shall not be discharged, where statement was requested by banking company for its own protection in its transaction with mercantile company.—Textile Banking Co., Inc., v. Goldenberg, U. S. C. C. A., 12 F. (2d) 506.

9.——Homestead. — Requirements of Civ. Code S. C. 1922, §§ 5490, 5491, enacted pursuant to Const. S. C. 1895, art. 3, § 28, requiring homestead allotment to be recorded, were not obviated because allotment was made in bankruptcy proceeding instead of action in state court.—McCrae v. Felder, U. S. C. C. A., 12 F. (2d) 554.

10.——Lien.—Creditor of bankrupt must support by proof his claim of lien on property in trustee's possession, though he asserted it in sworn proof of secured debt, instead of intervening petition, as is preferable; such formal proof being under Bankruptcy Act, § 57d (Comp. St. § 9641), prima facie evidence only of the debt, and the reference therein to security being required only as a basis for determining, under section 57e, the extent to which secured creditors may participate in the proceedings of creditors.—Weekley v. Oil Well Supply Co., U. S. C. C. A., 12 F. (2d) 539.

11.——"Pleading."—Under Bankruptcy Act, § 18f (Comp. St. § 9602) providing that, if judge be absent from district on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, clerk shall refer case to referee having jurisdiction under section 38 (1), being Comp. St. § 9622, answer of alleged bankrupt, admitting insolvency and inability to pay debts and that it might be adjudicated a bankrupt held not a "pleading," which precluded reference under statute.—Ewing v. Forrester Nace Box Co., U. S. C. C. A., 12 F. (2d) 864.

12.——Preference.—Instrument whereby legatee directed excutor to pay himself, from her share of moneys thereafter to be collected, balance owing on her husband's contract, evidencing an executory arrangement which was not completed till within four months prior to her being adjudicated bankrupt, when the executor knew such application would be a voidable preference, payment thereunder was void.—Rovelsted v. Nelson, U. S. D. C., 12 F. (2d) 608.

13.——Preference.—Payment by a bank, while a going concern of the check of a depositor, who had on deposit more than sufficient money to meet it held not a "preference," constituting an act of bankruptcy.—Roberts v. Yegen, U. S. C. C. A., 12 F. (2d) 654.

14.——Provable Claims. — Unliquidated claims arising out of contract are provable, within Bankruptcy Act (Comp. St. § 9585 et seq.), though damage claims for tort are not, and holders of such contract claims were qualified as petitioning creditors having provable claims.—Spear v. Gordon, U. S. C. C. A., 12 F. (2d) 778.

15.——Set-Off of Rent.—Receiver could not set off rent of premises which he occupied against deposit made by bankrupt to secure performance of lease, which landlord terminated on tenant's deposit, with agreement to be liable for any deficiency which might arise on reletting, as local rule permitting landlord to hold deposit until end of original term for application on any deficiency is rule of property, and should be followed.—In re Nathanson, U. S. D. C. 12 F. (2d) 622.

16.——Title to Property.—Until qualification of trustee, title to property remains in bankrupt, and an insurance company cannot defend against a loss on the ground of a transfer of title.—In re Press Printers & Publishers, U. S. C. C. A., 12 F. (2d) 660.

17.——Warehouse Receipt.—Pledgee of warehouse receipt for scrap iron, which had been removed from warehouse by bankrupt unknown to pledgee held not entitled to proceeds after bankruptcy, where it had permitted bankrupt to retain possession after discovery of conversion, though requiring that it be marked as its property.—In re Coates, Bennet & Reidenbach, U. S. C. C. A., 12 F. (2d) 497.

18.——Withdrawal of Petition.—A debtor may withdraw a voluntary petition filed by him, after due notice to creditors, at any time before adjudication.—In re Thorpe, U. S. C. C. A., 12 F. (2d) 775.

19. **Banks and Banking** — Canceling Letter of Credit.—Where damages to seller of coal sold c. i. f. Italy, resulting from defendant's cancellation of irrevocable letter of credit, established with defendants for seller, was based on market price of coal in Italy, necessitating testimony of experts, interest on claim was properly denied.—Ernesto Foglino & Co. v. Webster, N. Y., 216 N. Y. S. 240.

20.——Check in Escrow.—Where bank accepted check with escrow agreement, collected it, carried proceeds in escrow account in form of its cashier's check payable to order of "Escro," and thereafter paid amount to one of parties after judgment in his favor without knowledge of other party to escrow agreement held that on reversal of such judgment the claim of the successful litigant against bank was within protection of depositors' guaranty fund as for deposit, and not sale of exchange.—Austin v. Matthews, Tex., 284 S. W. 308.

21.——Imputable Knowledge.—Where loan at 8 per cent interest to bank and 2 per cent additional to president thereof was made by president and no other officer had anything to do with the contract, president's knowledge that loan constituted usury must be imputed to bank.—Citizens' Bank v. Heyward, S. C., 133 S. E. 709.

22.——Letter of Credit.—Letter from bank, reciting that it had received instructions from representative of Italian Ministry of Shipping to open credits in addressee's favor for specified sum for coal purchased by Italian government, c. i. f. Italy, payments to be made against delivery of documents duly viseed by such representative held a commercial letter of credit, and irrevocable, where it contained no words stating possibility of revocation, despite requirement for vise of representative.—Ernesto Foglino & Co. v. Webster, N. Y., 216 N. Y. S. 225.

23.——Overdraft.—Where a bank with a checking account in a correspondent bank draws a draft on the latter, and the drawee pays the draft in good faith in the regular course of business pursuant to a custom between the two banks, thereby creating an overdraft of the drawer bank, which is closed in the meantime owning to insolvency, the drawee, if without knowledge of such insolvency, and having reason to believe that funds or credits are in transit to fully cover the overdraft, may in equity be subrogated to the rights of the original holder of the exchange, and may participate to the extent of the overdraft in the bank guaranty fund.—Nebraska Nat. Bank of Hastings v. Bruning, Neb., 209 N. W. 510.

24.——Set-Off of Deposit.—A depositor in an insolvent national bank cannot set off his deposit against a debt due the receiver, which accrued after the receivership.—Wasson v. White, U. S. D. C., 12 F. (2d) 809.

25.——Trust Fund.—Bank held not liable for participating in breach of trust, though it, with knowledge of trust, allowed trustee with authority to disburse trust fund according to respective interests of beneficiaries, to pay debts which they owed bank and to check out remainder, where trustee had authority to sign checks and notes for plaintiff beneficiary and plaintiff signed written declaration that bank was not indebted to him.—Demas v. First Nat. Bank, Ore., 247 Pac. 151.

26. **Bills and Notes**—Insufficient Funds. — That there were insufficient funds in bank to pay check held not to excuse drawee from presenting it for payment before bank failed, where arrangements had been made with bank to pay check when presented.—Knauss v. Aleck, Iowa, 209 N. W. 444.

27.——Knowledge of Broker.—Bona fide purchaser for value of negotiable note and mortgage is not chargeable with knowledge obtained by broker, acting only for mortgagee, of mortgagee's agreement with mortgagor not to transfer note and mortgage, and hence holds same free from infirmities.—O'Bryan v. Jackson, Ore., 247 Pac. 318.

28.——Postdated Check.—Postdated check is in effect same as bank draft payable on demand at or after day of its date.—J. B. La Croix & Frere v. Eaton, Vt., 133 Atl. 745.

29.——Postdated Check.—A "postdated check" is one delivered prior to its date, generally payable at sight or on presentation on or after day of its date, and differs from an ordinary check by carrying on its face implied notice that there is no money presently on deposit available to meet it, but with implied assurance that such funds will exist when check becomes due.—Lovell v. Eaton, Vt., 133 Atl. 742.

30.——Presentment.—Check presented for payment six or seven days after receipt by drawee, who took it to his farm, having received it after banking hours, held not presented within "reasonable time" within Code 1924, § 9647.—Knauss v. Aleck, Iowa, 209 N. W. 444.

31. **Brokers**—Commission. — Where a contract between a landowner and a broker for sale of a farm provides that the broker shall receive his commission "out of the first cash payment at the time of sale," and a sale is effected, and $300 is paid down, which is retained by the broker in satisfaction of his commission, the subsequent failure and refusal of the purchaser to pay the balance of the purchase price does not give the landowner a right of recovery of the commission retained by the broker.—Moser v. Simmons, Ohio, 152 N. E. 688.

32.——Commission.—Principal, selling at lesser price than stipulated in contract with broker to purchaser with whom broker is negotiating during existence of contract, is liable to broker.—Patton, Temple & Williamson v. Garnett, Va., 133 S. E. 495.

33.——"Real Estate Broker."—As respects right to recover commssion, business broker, selling or exchanging businesses as going concerns, is not a "real estate broker," within Real Property Law (Consol. Laws, c. 50), § 440-a, requiring license, though businesses and good will sold or exchanged by him may include leases of stores or buildings.—Weingast v. Rialto Pastry Shop, N. Y., 152 N. E. 693.

34. **Building and Loan Associations**—Breach of Contract.—Allegations that building association utilized information disclosed to it by applicant for loan to purchase land, with result that association purchased land, are not sufficient to show fraud or a fiduciary relation between applicant and association or its agent or landowner, or to establish constructive trust ex maleficio.—Goldman v. Harford Road Bldg. Ass'n, Md., 133 Atl. 843.

35. **Carriers of Goods**—Rebate by Grain Elevator.—Grain elevators, receiving export wheat from lake vessels, and thereafter loading it into railroad cars as part of through shipment which receive compensation for such service from the carrier, violate Elkins Act (Comp. St. §§ 8597-8599), if they in turn rebate or refund to consignees a part of the elevating charge so collected, though there be no connivance or collusion between elevators and carriers; the act being applicable to "any person or corporation."—United States v. Spencer Kellogg & Sons, U. S. D. C., 12 F. (2d) 612.

36. **Carriers of Passengers** — Negligence. — Evidence that passenger in cab bearing defendant's name knocked on window to caution driver to stop speeding, and that cab skidded 30 feet after collision, presents a prima facie case of negligence by cab company.—Anderson v. Green Cab Co., N. J., 133 Atl. 788.

37.——Negligence.—Damages for sickness resulting from plaintiff's leaving train to drive across country, on being informed that he would be unable to make connections held not too remote to afford basis of recovery.—Mishoe v. Atlantic Coast Line R. Co., S. C., 133 S. E. 704.

38. **Constitutional Law**—Delegation of Legislative Power.—Rev. Codes 1921, § 3833, giving board of railroad commissioners power to order carrier to construct spur at will, and without requiring that notice of hearing be given carrier or opportunity to produce testimony relative to necessity of spur held an unconstitutional delegation of legislative power, in view also of sections 3827-3832.—Chicago, M. & St. P. Ry. Co. v. Board of Railroad Com'rs, Mont., 247 Pac. 162.

39.——Inspection of Migratory Live Stock.—Laws Colo. 1925, p. 489, § 6, providing that inspection of migratory live stock will not apply to state residents, held unconstitutional, as violating Const. U. S. art. 4, § 2, cl. 1, and Fourteenth Amendment, § 1, relating to privileges and immunities of citizens of several states and of United States.—People v. Morgan, Col., 246 Pac. 1024.

40. **Contracts**—Contractor's Charges. — Owner's acceptance of work performed by contractor on cost-plus basis, after contractor's dismissal and completion of work by another contractor held not to deprive owner of legal right to impeach charges made by original contractor in his accounts.—Hitt v. Smallwood, Va., 133 S. E. 503.

41.——Good Will.—Contract whereby vendor of ice business employed by purchaser agreed not to engage anywhere in the city in similar business for two years after leaving purchaser's employ held valid.—Texas Ice & Cold Storage Co. v. McGoldrick, Tex., 284 S. W. 615.

42. **Corporations**—Authority of President.—General rule is that president of corporation, unless he acts within scope of his general authority, cannot bind corporation, but rule may be altered by circumstances.—Levitas v. Yarmel Realty Corporation, N. Y., 216 N. Y. S. 419.

43.——Franchise Tax.—A corporation which is engaged in doing character of business upon which a franchise tax is imposed becomes liable for such tax, notwithstanding such business is ultra vires its charter powers.—State v. Acacia Mut. Life Ass'n, Ala., 108 So. 756.

44.—Legality of Incorporation.—A person who sues a corporation as such thereby admits the legality of its incorporation, and is estopped from denying it in that suit. The same is true when a person files a cross-petition or counterclaim against a corporation.—Bell v. Commercial Inv. Trust Co., Okla., 246 Pac. 1102.

45.——Ownership of Stock.—Knowledge of corporate officer who sold stock which he owned as to its becoming separate property of married woman, who bought it, cannot be imputed to corporation.—Wilson v. Shear Co., Tex., 284 S. W. 654.

46. **Covenants**—Building Restrictions.—That one of several purchasers from same vendor violated restriction against flat-roof buildings which was contained in all deeds held not to permit another to do so, where such restriction was neighborhood scheme.—Durham Essex Corporation v. Schaffer, N. J., 133 Atl. 754.

47.——Building Restrictions.—Restrictions in deed that lots "shall be used solely for residence purposes" does not forbid erection of an apartment house thereon.—Miller v. Ettinger, Mich., 209 N. W. 568.

48. **Deeds**—Delivery.—Duly executed deed, delivered to depositary without reservation of control, with intent that latter is to retain custody until grantor's death and then deliver it, is grantor's deed in praesenti from time of deposit—Kolber v. Schneider, Wis., 209 N. W. 595.

49.——Undue Influence.—Grantor's mistress has burden of proving that conveyance to her was uninfluenced by such relationship.—Taylor v. Taylor, Col., 247 Pac. 174.

50. **Electricity**—Negligence.—Electric company's maintenance of high voltage wires in such proximity to trees that during storm limbs pressed wires together, causing them to burn down held sufficient evidence of negligence to go to jury in action for personal injuries.—Rocca v. Rosenstiel, Ohio, 152 N. E. 677.

51.——"Obstruction."—Under grant of right of way to power company entitling it to operate its lines thereon with right to keep it clear of trees and undergrowth and other "obstructions," held that a dwelling house encroaching on company's right of way to point within one of its lines was an obstruction, which it was entitled to have removed.—Collins v. Alabama Power Co., Ala., 108 So. 868.

52. **Eminent Domain**—Compensation.—Where a steam railroad is located in and along a street near the center thereof, and the city, through its council, determines to relocate the line of said railway and place the same so near to the property line of an abutting owner that trucks and other ordinary vehicles standing or passing along said premises would be struck by passing trains, such change of location results in an obstruction to and interference with access to such property, and is a "taking of private property" for public use, and the property owner is entitled to first have compensation in money, or to be secured by a deposit of money for such taking before such relocation is made, the same to be assessed by a jury.—Ghaster v. City of Fostoria, Ohio, 152 N. E. 651.

53. **Fraud**—Issuing Check Without Funds.—G. L. 6888, providing body action against maker of check without sufficient funds applies where check presently payable was given for a pre-existing debt then overdue, without allegation of special damages, or other injury than its nonpayment.—Lovell v. Eaton, Vt., 133 Atl. 744.

54.——Misrepresentations. — Positive affirmation by sellers that stock they were proposing to sell was at time of sale actually worth more than its par value, which was false, held actionable.—Roark v. Prideaux, Tex., 284 S. W. 624.

55. **Frauds, Statute of**—Party to Be Charged.—A contract, in the body of which the name of the vendor is specified and the name of the vendee is specified as "Isaac Kamens or his nominee," meets the requirement that the name of both parties to the contract shall appear in or by the writing, notwithstanding the contract is signed "Isaac Kamens, Agent," below the signature of the vendor; and a bill for specific performance may be maintained by the vendee named in the body of the contract as the person for whose benefit the contract was made.—Kamens v. Anderson, N. J., 133 Atl. 718.

56. **Fraudulent Conveyances**—Defrauding Creditors.—In an action to set aside a conveyance of land as a fraudulent conveyance, when it appears from the evidence that the land sold was not at the time of sale worth more than the incumbrances against it, and the sale was made for the purpose of paying interest and taxes against the land, and preventing the foreclosure of a mortgage thereon, held for reasons stated in the opinion, that such transfer was not made with intent to defraud creditors.—Ford v. Brown, N. D., 209 N. W. 386.

57.——Undisputed Possession. — Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3969, defendant and those claiming under him, delivering pipe line to oil company, as a loan, cannot assert title against creditors or purchaser from company, when possession is permitted to continue in latter for more than two years, without demand made and pursued by due process of law.—Absolene Co. v. Letwin, Tex., 284 S. W. 288.

58. **Insurance**—Confined to House.—Insured held "confined" within accident and sick benefit insurance policy, and entitled to compensation thereunder, while incapacitated from illness for work of any kind, though he was able to visit office of attending physician for treatment, since "confined" in this connection means inability to work rather than physical inability to leave house.—Newton v. National Life Ins. Co., La., 108 So. 769.

59.——Insanity. Where assured was taken with fatal illness and 5 months later became insane, insurer was not released from liability under policy providing that if claim arose from insanity insurer should not be liable unless disability resulted after policy was in force 90 days, and then benefits should be paid only for first 40 days of disability, ambiguity therein being construed to prevent forfeiture.—Crowe v. Merchants' Life & Casualty Co., Iowa, 209 N. W. 406.

60.——Insurable Interest.—The policy of insurance was issued to R. C. Shaw, who had no title to the property and therefore was "without insurable interest and legally incapable of taking out a policy" on the property covered by the policy. As R. C. Shaw was not the owner of the property insured, the principle announced in Southern States Fire & Casualty Ins. Co. v. Napier, 22 Ga. App. 361 (2), 96 S. E. 15, is not applicable to this case.—Colonial Trust Co. v. Fireman's Fund Ins. Co., Ga., 133 S. E. 652.

61.——Inventory.—A fire insurance policy on a stock of goods contained a clause which provided that the policy should be void unless the insured "will take a complete, itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within 30 days of issuance of this policy." Held that an inventory made by the insured within the time limited in the contract, which states in separate items the quantities of various kinds and assortments of goods and the prices thereof and the amounts which such prices aggregate, is a sufficient compliance with the contract requiring an inventory to prevent forfeiture of the insurance, without stating expressly that the separate items of goods were of a specified "actual value" at the time the inventory was taken.—Goldman v. Aetna Ins. Co., Ga., 133 S. E. 741.

62.——Loss Under Marine Policy.—Agreement under which plaintiff exported goods from Sweden for B. to sell in America, and B. exported goods from America for plaintiff to sell in Sweden, profits and losses to be divided equally, even if constituting a joint venture held not to make B. plaintiff's general agent to receive payment for loss under marine policies, after title to goods shipped by B. vested in plaintiff, who held insurance certificates.—Graham Bros. v. St. Paul Fire & Marine Ins. Co., N. Y., 216 N. Y. S. 346.

63.——Notice of Loss.—Where insured, under policy insuring against robbery, sustained loss at 11:30 Saturday night and loss was communicated to company by 4:30 on Monday, provision for "immediate notice" was sufficiently complied with, company not having suffered loss by delay.—Biederman v. Commercial Casualty Ins. Co., N. J., 133 Atl. 772.

64.——Payment of Judgment.—Bill in equity against judgment debtor and insurance company to compel payment of judgment for damages for personal injuries from being struck by automobile, alleging that at time injuries were received insurance company had in force with judgment debtor a "contract of insurance • • • indemnifying her against loss from liability imposed by law on her on account of bodily injury, suffered by any person by reason of the ownership, maintenance, or use of her automobile," held to disclose only a policy of indemnity against actual pecuniary loss, and hence demurrable, nothwithstanding Code 1923, §§ 8376, 8377.—Globe Indemnity Co. v. Martin, Ala., 108 So. 761.

65.——Proof of Loss.—Insurer's retention, without protest, of proofs of loss furnished after time for giving notice of loss had elapsed, and insured's rights had been lost, was not a waiver of requirement that notice of loss be given immediately.—Greenwich Bank v. Hartford Fire Ins. Co., N. Y., 216 N. Y. S. 315.

66.——"Theft."—Acquiring automobile by pretended purchase on condition of immediate delivery, giving false name and address and worthless check after banking hours, held to be "theft" within meaning of insurance, policy, in view of Gen. Laws 1923, §§ 4864, 6070, 6072, 6073, 6075.—Brady v. Norwich Union Fire Ins. Soc., R. I., 133 Atl. 799.

67.——Total Disability.—To recover as for total disability, under policy requiring disability to perform any duty of occupation, insured need only show that he was, by reason of disease or sickness, directly and independently of other causes, unable, in the exercise of ordinary care and prudence, to transact or perform the substantial and material acts necessary to the performance of the duties of his occupations.—Metropolitan Life Ins. Co. v. Bovello, U. S. C. C. A., 12 F. (2d) 810.

68. **Interstate Commerce**—Oil in Storage.—Interstate character of shipments of oil from oil company's refineries by its own vessels to its storage plant, to be there stored and reshipped to substations and customers, at such times and in such quantities as business should demand, held terminated by such stoppage and storage, so that subsequent shipments from such plant to points within state were subject only to intrastate rates, notwithstanding further movement was contemplated when shipment was originally made.—Atlantic Coast Line R. Co. v. Standard Oil Co. of New Jersey, U. S. C. C. A., 12 F. (2d) 541.

69.——Trucker in Freight Depot.—Trucker in freight depot, injured while handling shipment being transported from Dallas, Tex., to Monterey, Mexico, held engaged in interstate commerce, within federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), notwithstanding, because of revolution in Mexico, shipment was moved on local bill of lading from Dallas to Laredo, Tex., and shipment moved across border by truck, where new bill of lading was procured.—Gulf, C. & S. F. Ry. Co. v. Young, Tex., 284 S. W. 664.

70. **Labor Unions**—Rate of Wages.—Labor union rule that wages paid by employer, resident of different town from where work was being done, should be at highest rate in force in either of two towns, applying to everybody, regardless of state residence, held not an unlawful discrimination, in violation of constitutional right of every citizen to enjoy privileges and immunities of citizens in the several states.—Barker Painting Co. v. Local No. 734, Brotherhood of Painters, U. S. D. C., 12 F. (2d) 945.

71. **Life Estates**—Improvements on Land.—Life tenant may recover for enhancement in value of land caused by valuable improvements other than ordinary repairs placed on land in good faith under belief that he was owner in fee.—O'Donnell v. Mathews, Mo., 284 S. W. 204.

72. **Master and Servant**—Assumption of Risk.—Where brakeman was killed by backing engine, doctrine of assumption of risk was inapplicable, if negligence of the engineer, which decedent could not have foreseen or expected, was proximate cause of the injury.—Moran v. Hines, Ohio, 152 N. E. 664.

73.——Safe Place.—Fellow-servant rule does not apply when negligence alleged is that of failing to exercise ordinary care to furnish reasonably safe place for work.—Jones v. Liggett & Myers Tobacco Co., Mo., 284 S. W. 513.

74.——Violating Safety Rule.—In action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of brakeman, who was killed while going between rails in front of moving car to effect coupling, railroad's liability being predicated on defective roadbed, held that where car was equipped with automatic couplers deceased's conduct, which was in violation of federal Safety Appliance Act, § 2 (U. S. Comp. St. § 8606), and not condition of roadbed, was proximate cause of injury.—Talbert v. Chicago R. I. & P. Ry. Co., Mo., 284 S. W. 499.

75. **Mines and Minerals**—Possession of Surface.—Adverse possession of surface after there has been severance of minerals is not possession of minerals, so as to give owner title thereto.—Gill v. Colton, U. S. C. C. A., 12 F. (2d.) 531.

76. **Municipal Corporations**—Zoning Ordinance.—Separation of business and industrial activities of the city from its residential portions reasonably administered may be supported in behalf of public safety, public health, comfort, and convenience.—City of Providence v. Stephens, R. I., 133 Atl. 614.

77.——Zoning Ordinance.—Application of zoning ordinance in refusing permit to erect gasoline station directly opposite end of parkway and on important avenue in residential district held not unreasonable exercise of police power.—Long v. Scott, N. J., 133 Atl. 767.

78. **Negligence**—Defective Seating Arrangement.—If unsafe seating arrangement in agricultural fair could not be repaired before patrons began to use it and its danger was not open and obvious, patrons should have been warned or excluded therefrom, and failure to do so, if proximate cause

of injury to patron, would be actionable negligence. —Le Cato v. Eastern Shore of Virginia Agr. Ass'n, Va., 133 S. E. 488.

79.——Liability of Tractor Manufacturer.—Tractor manufacturer, fully explaining method of operation to purchasers, who read instructions fully stating what to do if it became mired, was not required to notify their servants individually that it might become dangerous in such situation. —Foster v. Ford Motor Co., Wash., 246 Pac. 945.

80. **Nuisance** — Slaughter House. — Though slaughter house in residential district is prima facie nuisance, court of equity requires evidence of actual nuisance before granting injunction.—Conway v. Gampel, Mich., 209 N. W. 562.

81. **Oil and Gas**—Assignment of Lease.—Since an assignment of a lease signifies a parting with the whole term, if lessee grants an interest less than his own retaining for himself a reversion, it is a sublease and not an assignment.—McNamer Realty Co. v. Sunburst Oil & Gas Co., Mont., 247 Pac. 166.

82.——Lease.—Oil and gas leases for consideration of $1 per acre, providing that lessee should pay after approval of titles and providing for drilling of test wells held not unilateral or to contain potestative conditions.—Swope v. McCurry, La., 109 So. 83.

83. **Railroads**—Cars Obstructing View.—If a railroad company, in the ordinary conduct of its business, leaves freight cars standing upon a side track at or near a public crossing, so as to partially obstruct the view of persons passing over such crossing, such fact of itself does not render the company liable for accidents occurring at the crossing, but merely imposes a duty of greater care both upon the company and upon those using the highway. Paragraphs 4 and 5 of Missouri, Kansas & Texas Railway Co. v. Perino, 89 Okl. 136, 214 P. 907, are expressly overruled.—Missouri, K. & T. Ry. Co. v. Perino, Okla., 247 Pac. 41.

84.——Logging Road Not "Railroad Company." —A corporation or company engaged in the operation of a sawmill, and operating as an incident to such business an ordinary log road or tram road for the sole purpose of transporting logs from the forest to the mills, is not a "railroad company" within the provisions of sections 4964, 4965 and 4966, Rev. Gen. Stat. 1920.—J. Ray Arnold Lumber Co. v. Carter, Fla., 108 So. 815.

85. **Sales**—Commissions.—In action on notes for price of phonographs, defense that bond guaranteeing commissions, earned by defendant in selling other phonographs was void, because signed by individual partners composing plaintiff firm, was eliminated when defendant surrendered sales agency, thereby waiving right to future commissions.—Brenard Mfg. Co. v. M. Levy, Inc., La., 109 So. 43.

86.——Merchantable Condition.—In purchaser of cabbage by wholesaler, seller's warranty to pack and ship same in merchantable condition held to require shipment in marketable condition by wholesaler in carload lots, and not for immediate consumption in retail market; "merchantable" meaning marketable citing Words and Phrases.—Newbern v. Joseph Baker & Co., Va., 133 S. E. 500.

87.——Terms of Contract.—Where evidence as to meaning of provision of contract for sale of bunker coal that "price inserted is based upon government fixed price, and subject to any revision," was conflicting, buyer contending that price was subject only to changes made by government, and seller contending that price was subject to revision after government control ceased, held that language being ambiguous, meaning thereof was properly submitted to jury.—C. G. Blake Co. v. W. R. Smith & Son, Va., 133 S. E. 685.

88.——Warranty of Seed.—Where purchaser of seed potatoes knew of their defective quality after inspection upon delivery and before planting them, and could have purchased good seed upon falling market, recovery of consequential damages for breach of warranty of seed held not allowable.—Moon v. Washington-Beaufort Land Co., Va., 133 S. E. 498.

89. **Subrogation**—Funds for Public Work.—In view of Code, 1906, §§ 361, 363, Hemingway's Code, §§ 3734, 3736, and Laws 1918, c. 217, relative to bond of contractors engaged in public work, surety company having paid laborers' and materialmen's claims is entitled to be equitably subrogated to 15 per cent retained by county, as against subsequent assignment by contractor of all funds under contract.—Canton Exchange Bank v. Yazoo County, Miss., 109 So. 1.

90. **Telegraphs and Telephones**—Negligence.—Mere leaving of telephone wires on house, from which telephone had been removed before death by lightning held not negligence as matter of law. —Sinkovich v. Bell Telephone Co., Pa., 133 Atl. 629.

91. **Theaters and Shows**—Due Care.—Evidence that plaintiff was injured when, in placing herself in theater seat, it broke, and she fell to floor, put upon proprietor duty to show reasonable diligence had been used to provide safe accommodations, and that a proper inspection was made to assure their suitable condition. — Durning v. Hyman, Pa., 133 Atl. 568.

92.——Lighting.—Under Gen. Code, § 12600—35, requiring that theaters be well and properly lighted during every performance, no definite degree or standard being given, lighting must be such as ordinary prudence would demand, considering purpose for which theater was used and having due regard for safety of patrons.—Espel v. Cincinnati Walnut Theater Amusement Co., Ohio, 152 N. E. 684.

93. **Trade-Marks and Trade Names**—Delay in Bringing Suit.—Where complainant did not commence suit to restrain defendant, which had contract right to use complainant's trade name in connection with certain kind of ovens, from using complainant's name in connection with other ovens until eight years after complaining to defendant of such use, and defendant's belief that it had right to use name in that connection was not unreasonable held that plaintiff's laches barred decree for accounting.—Middleby-Marshall Oven Co. v. Williams Oven Mfg. Co., U. S. C. C. A., 12 F. (2d) 919.

94. **Trusts**—Constructive Trust.—Where daughter procured conveyance of property from mother, orally promising to reconvey at mother's request, law raises constructive trust, not within statute of frauds.—Dillfelder v. Winterling, Md., 133 Atl. 825.

95. **Wills**—Bequest to Boy Scouts.—Bequest to troop of Boy Scouts, to be used in carrying on its work held a gift for charitable uses capable of administration for definite class of beneficiaries, although words "trust" or "trustee" were not employed in connection with bequest.—Tillinghast v. Council at Narragansett Pier, R. I., 133 Atl. 662.

96.——"Some Other Will."—Where attorney, on testatrix's direction to change certain bequest of existing will, drew lines through paragraph making such bequest and through signatures of testatrix and attesting witnesses, and changed date of will, and, after will was read to testatrix and republished, testatrix and witnesses again signed instrument held that will was revoked by "some other will in writing" within Decedent Estate Law, § 34; "some other will" not requiring another will or a different sheet of paper.—In re Bissonnette's Will, N. Y., 216 N. Y. S. 325.

97. **Workmen's Compensation**—"Dependent." — Woman in good faith believing herself to be wife of deceased, cohabiting with him, and at all times holding herself out and recognized as such held entitled to compensation for his death as "dependent," under St. 1917, p. 844, § 14, subd. 1.—Landsrath v. Industrial Acc. Commission, Cal., 247 Pac. 227.

98.——Freezing Foot.—Mere freezing of employee's foot in course of employment was not "accident" within Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10, as amended).—Mauch v. Bennett & Brown Lumber Co., Mich., 209 N. W. 586.

99.——Unlawful Remarriage.—Second marriage of employee's widow to one who was not allowed to remarry by divorce decree obtained by his former wife, or any subsequent decree, was a nullity, under Code 1923, §§ 3440, 3441, 7410, 7425, and hence did not work discontinuance of compensation under section 7564.—Gulf States Steel Co. v. Witherspoon, Ala., 108 So. 573.